BEFORE THE STATE WATER RESOURCES CONTROL BOARD
OF THE STATE OF CALIFORNIA

**PETITION FOR REVIEW AND
REQUEST TO HOLD IN ABEYANCE**

(REQUEST FOR STAY OF ORDER CONCURRENTLY FILED)

Regarding Waste Discharge Requirements Order No. R9-2007-0001, National Pollution Discharge Elimination System No. CAS0108758, approved by the Regional Water Quality Control Board, Region 9 (San Diego), on January 24, 2007.

SUBMITTED BY:

FOLEY & LARDNER LLP
ATTORNEYS AT LAW
402 W. Broadway, Suite 2100
San Diego, California 92101-3542
TELEPHONE: 619.234.6655
FACSIMILE: 619.234.3510

S. Wayne Rosenbaum, Bar No. 182456
John C. Lemmo, Bar No. 190885
Alyssa Aiko Osugi, Bar No. 234853

Attorneys for Petitioners,
Coalition for Clean Water and a Healthy Economy (the "Coalition"), and
The Building Industry Association of San Diego County ("BIASD"

PETITION FOR REVIEW

I. INTRODUCTION

This Petition seeks immediate State Board review and action on the San Diego Regional Board's recent adoption of waste discharge requirements for all cities within and including San Diego County, the San Diego Unified Port District and the San Diego Regional Airport Authority. The order goes beyond both the letter and intent of federal and state law authorizing such orders, avoids the opportunity for and extent of public review necessary for substantial changes to the physical environment that are a universally recognized result of the order, and is impractical or unduly burdensome to implement in the "real world". While it is appropriate and necessary for the Regional Board to adopt meaningful orders to protect water quality, this Petition explains and demonstrates that applicable law and most evidence does not support the broad sweep of this particular order.

On January 24, 2007, just nine days after it issued a third revised tentative order, the California Regional Water Quality Control Board, Region 9 (San Diego) ("Regional Board") adopted and issued Order No. R9-2007-0001, NPDES No. CAS0108758, entitled, "Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority" (the "Order" or "Municipal Storm Water Permit"). A true and correct copy of the Order is attached to this Petition as Exhibit 1. In short, the 21 "Permittees" (sometimes called "Copermittees") addressed by the Order are the County of San Diego, the San Diego Unified Port District, the San Diego Regional Airport Authority, and the 18 cities within the County.

In adopting the Order, the Regional Board improperly shifted its enforcement authority over literally dozens of non-city or other local public agencies to the 21 Permittees.

Not only do the Permittees lack the legal authority to enforce their storm water regulations against state and local public agencies pursuant to California law (e.g. school districts, water districts, redevelopment agencies, etc.), but many of these local agencies are Phase II nontraditional MS4s that the State Water Resources Control Board ("State Board") has expressly ordered the Regional Board to designate under the State Board's General Permit for Storm Water Discharges from Small MS4s. The Regional Board has also improperly transferred its duties concerning private third party dischargers to the Permittees. For example, the Order requires the Permittees to inspect industrial and commercial sites to determine if such sites have obtained coverage under the applicable NPDES permits. This type of activity must be the responsibility of the Regional Board, and not the Permittees, because the Permittees have no legal authority to take any enforcement action against a third party discharger for violations of the Clean Water Act ("CWA") or applicable NPDES permits (other than to file a citizen's suit).

In addition to improperly shifting its enforcement responsibilities to the Permittees, the Regional Board has exceeded its legal authority by regulating discharges "into" the MS4. It has also overstepped its primary responsibility for controlling water quality and usurped the authority of the Permittees, as local jurisdictions, to make local land use decisions by mandating particular planning and design decisions appropriate for each municipality. The Regional Board has also required the Permittees to develop Interim Hydromodification[1] Criteria on a shortened time frame despite express and unequivocal acknowledgement by Regional Board staff that it will take approximately three years at the very least to develop an adequate

[1] "Hydromodification" as used in the Order means the change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes.

Hydromodification Management Plan for the region. The Interim Hydromodification Criteria would apply site-by-site, in contrast to the State Board Blue Ribbon Panel's[2] recommendations that this type of control be completed on a watershed scale. Hydromodification is just one of the areas in which the Order creates potential inconsistencies with the General Construction and General Industrial Storm Water Permits when they are re-issued by the State Board.

In addition to these issues, the Regional Board failed and refused to consider factors required by the Legislature in Water Code section 13241 – including past, present and future beneficial uses of water, environmental characteristics of the hydrographic units, water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality, economic considerations, the need for developing housing within the region, and the need to develop and use recycled water. (See Water Code § 13241). Perhaps it is not surprising that the Regional Board was so steadfast in avoiding the mandate of section 13241—even the most basic, elemental analysis would have indicated that regional economic and affordable housing impacts would be significantly adverse as best, and potentially devastating at worst. The section 13241 analysis is mandatory because the provisions of the Order exceed the scope of the federal maximum extent practicable ("MEP") storm water quality control standard.

The Order also requires the 21 Permittees to design individual storm water management plans, yet it does not provide for sufficient public participation and Regional Board review of those plans. The Regional Board also ignored its obligation to conduct environmental review of the impacts of the Order under the California Environmental Quality Act ("CEQA"), and it failed to provide the required public notice and opportunity to comment prior to adopting

---

[2] The State Board established a Blue Ribbon Panel to address, among other concerns, watershed-based stormwater controls.

the Order. All of these procedures are necessary to inform the decision of the Regional Board prior to adopting the Order (not to mention real party Permittees and the general public). Nevertheless, these concerns, although brought to the Regional Board's attention by the public on several occasions, were ignored in violation of both federal and California law.

Continuing the Regional Board's apparent "theme" of improperly avoiding public review and opportunity to comment, a representative of the State Board ("Dolores White") informed Petitioners on February 22 that the Board has, without public comment or review, determined that the 30 days allowed by statute for this Petition counts the action day as the first of those 30 days. In other words, petitioners only have 29 days after the action to file. That reading of the statute is incorrect. In any event, the Petitioners have endeavored to file on February 22 (under protest), even though the 30th day by any count is February 23.

Finally, the Regional Board's Order is replete with unfunded mandates. It imposes numerous new programs and higher levels of service on the Permittees that exceed the requirements of federal law. It became apparent through the comment letters and testimony by the Permittees that they are ill-equipped to assume the enormous cost of providing the new programs and higher levels of service mandated by the Order. Yet the Order fails to provide any mechanism for the reimbursement required under the California Constitution.

For these reasons, the Coalition for Clean Water and a Healthy Economy (the "Coalition"), and the Building Industry Association of San Diego County ("BIASD") (hereinafter jointly "Petitioners"), aggrieved parties, hereby petition the State Water Resources Control Board ("State Board") for review of the action of the Regional Board on January 24, 2007, in issuing the Order, pursuant to Water Code section 13320 and Title 23 of the California Code of Regulations ("CCR"), section 2050.

Further, the Petitioners hereby request that the State Board hold this Petition in abeyance pursuant to 23 CCR section 2050.5(d). The Petitioners have not obtained official

transcripts of the Regional Board's public hearings and action concerning the Order. Public hearings concerning the Order required several days over a period of months. The Petitioners intend to submit a supplemental petition and points and authorities after reviewing the official transcripts and administrative record of proceedings. Upon submission of the supplemental Petition and Memorandum of Points and Authorities, the Petitioners intend to request that the Petition be removed from abeyance and that the Petition be activated.

Concurrently submitted with this Petition is the Petitioners' Request and Memorandum of Points and Authorities in Support of a Stay on Implementation and Enforcement of the Order.

A. The Petitioners Represent the Water Quality Interests of a Diverse Group Including Small Businesses, Economic Development Agencies and Building Associations.

1. The Coalition for Clean Water and a Healthy Economy.

The Coalition is a coalition of associations representing the water quality interests of small businesses, economic development agencies, real estate management, construction and development state wide. The Coalition seeks to work with public agencies, including Regional Water Quality Control Boards, to develop sound strategies for protecting and improving water quality through regional solutions that are both environmentally sound and economically feasible. The Coalition includes the following members:

a. ***The San Diego Regional Chamber of Commerce.*** Founded in 1870, the San Diego Regional Chamber of Commerce has 3,000 member companies with over 400,000 employees, and is the leading voice of advocacy for the region's business community.

b. ***The San Diego Economic Development Corporation ("EDC").*** The EDC strives to attract and retain companies in San Diego County. The EDC works directly with these companies to assist in

their relocation and expansion. The EDC is a 41-year-old private, nonprofit corporation.

c. ***The Association of General Contractors, San Diego County Chapter ("AGC").*** The AGC is the voice of the construction industry. The AGC is an organization of qualified construction contractors and industry related companies dedicated to skill, integrity, and responsibility. The association provides a full range of services improving the quality of construction and protecting the public interest.

d. ***The Building Industry Association of San Diego County ("BIASD").*** The BIASD is a non-profit trade association that represents legislative and business interests of 1,450 member companies, and their 165,000 employees, who are active in the San Diego regional building industry.

e. ***The Construction Industry Coalition on Water Quality ("CICWQ").*** The CICWQ is comprised of the four major construction and building industry trade associations in Southern California: the AGC, the Building Industry Association of Southern California ("BIA/SC"), the Engineering Contractors Association ("ECA"), and the Southern California Contractors Association ("SCCA"). The membership of CICWQ, which is comprised of construction contractors, labor unions, landowners, developers, and homebuilders throughout the region, work collectively to provide the necessary infrastructure and support for the region's business and residential needs.

f. ***The Building Industry Legal Defense Foundation ("BILD").*** The BILD is a non-profit mutual benefit corporation and wholly controlled affiliate of the BIA/SC. The BIA/SC is a non-profit trade association representing more than 2,050 member companies with more than 200,000 employees. The mission of the BIA/SC is to promote and protect the building industry to ensure its members' success in providing homes for all Southern Californians. The BILD's purposes are to monitor legal developments and to improve the business climate for the construction industry in Southern California. The BILD's mission is to defend the legal rights of current and prospective home and property owners, and to accomplish this mission the BILD participates in and supports litigation necessary for the protection of such rights. The BILD promotes and supports important legal cases to secure favorable court decisions for private property owners and developers. The BILD focuses on cases with a regional or statewide significance to its mission.

g. ***The California Business Properties Association ("CBPA").*** The CBPA is the designated legislative advocate for the International Council of Shopping Centers ("ICSC"), the California chapters of National Association of Industrial and Office Parks ("NAIOP"), the Associated Builders & Contractors of California ("ABC"), Commercial Real Estate Women ("CREW") and the Institute of Real Estate Management ("IREM"). These affiliations make the CBPA the acknowledged voice of the commercial real estate

industry in California, representing the largest commercial real estate consortium with over 10,000 members. Members include property owners, tenants, developers, retailers, contractors, lawyers, brokers, and other service professionals in the industry.

h. ***The San Diego Association of Industrial and Office Parks of Southern California ("SDAIOP")***. The SDAIOP is dedicated to commercial/industrial real estate and continues to represent the real estate industry with strong legislative representation and great networking opportunities, educational programs, and "Forums", which bring principal members together for exclusive networking and experience exchange with their peers. SDAIOP literally represents a "who's who" in commercial/industrial real estate. The 340 local membership includes owners, real estate developers, investors, consultants, and brokers who create the built environment we all work, shop, and recreate in. The members of the National Association of Industrial and Office Parks ("NAIOP"), of which SDAIOP is the local chapter, build and maintain the structures that house JOBS, the lifeblood of our economic vitality and quality of life. In essence, whatever may occur in the commercial/industrial real estate industry, NAIOP is on top of it to advise, educate and advocate.

2. The Building Industry Association of San Diego County.

a. The BIASD is a non-profit trade association that represents legislative and business interests of 1,450 member companies, and

their 165,000 employees, who are active in the San Diego regional building industry.

All correspondence to Petitioners relating to this Petition should be made through counsel, S. Wayne Rosenbaum, phone: (619) 234-6655, address: 402 W. Broadway, 21st Floor, San Diego, CA 92101, e-mail: wrosenbaum@foley.com

B. Relief Requested.

The Petitioners request that the State Board rescind the Order, remand it to the Regional Board with direction that it make those changes necessary to comply with California and federal law, and require the Regional Board to hold a public hearing on a revised Order in compliance with the due process provisions of the CWA. The Petitioners further request that implementation and enforcement of the current Order be stayed until such time as the State Board has had an opportunity to hear and act on this Petition.

A copy of this Petition, as well as the Request for Stay filed concurrently herewith, have been submitted to the Regional Board and each of the Permittees through counsel. The substantive and procedural issues or objections raised in this Petition, as well as in the Request for Stay, were raised before the Regional Board during and prior to the Regional Board's meeting on January 24, 2007.

II. SUMMARY OF FACTS

In 2001, the Regional Board adopted Order No. 2001-01, which was and has been in place up until the Order was adopted on January 24, 2007, which is the subject of this Petition. That Order is intended by the Regional Board to replace and supersede the 2001 order.

The Regional Board began the formal process to reissue the San Diego County Municipal Storm Water Permit[3] in July of 2004 when it issued a document entitled the "San Diego County Municipal Storm Water Permit Reissuance Analysis Summary." From October 2004 to July 2005, the Regional Board met with the Permittees to discuss the Permittees' anticipated Report of Waste Discharge ("ROWD") and potential changes to the Municipal Storm Water Permit. Although the Petitioners' interests would be dramatically affected by changes to the Municipal Storm Water Permit, they were excluded from these discussions. Shortly thereafter, on August 25, 2005, the Permittees submitted their ROWD to the Regional Board.

On March 10, 2006, the Regional Board issued Tentative Order No. R9-2006-0011 (the "Tentative Order"), which purported to reissue the Municipal Storm Water Permit. The Regional Board held a "public workshop" to present the requirements of the Tentative Order. One of the Petitioners, BIASD, provided both written and oral comments at this workshop. Subsequently, the Regional Board held a second public workshop on the requirements of the Tentative Order. The BIASD also submitted both written and oral comments at the second workshop.

On June 21, 2006, the Regional Board held a public hearing concerning the Tentative Order. Both of the Petitioners submitted written comments and provided oral testimony at the public hearing. After hours of public testimony from many interested stakeholders and members of the public as well as the Permittees, the Regional Board directed staff to respond to the comments made at the public hearing and issue a revised tentative order. A revised version of the Tentative Order (the "Revised Tentative Order") with a supporting Fact

[3] San Diego County Municipal Storm Water Permit, Order No. 2001-01, NPDES No. CAS0108758.

Sheet as well as a Responses to Comments document was issued by the Regional Board on August 30, 2006.

The Regional Board's responses in the Responses to Comments document failed to fully address due process issues raised by the public comments. For example, the Coalition commented on the failure of the Tentative Order to provide meaningful review and public participation with regard to the various management plans that must be developed, revised and updated by the Permittees. In particular, the Coalition explained the import and affect of the United States Court of Appeals' opinion in *Environmental Defense Center, Inc. v. Environmental Protection Agency* (hereafter referred to as "*EDC*") (9th Cir. 2003) 344 F.3d 832. The court in *EDC* held that while individual regulated parties (i.e. permittees) may design aspects of their own stormwater programs, those programs "*must, in every instance*, be subject to meaningful review by an appropriate entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable." (*Id.* at 856 (italics added).) The BIASD also commented on this legal issue.

As part of its comments, the Coalition suggested a simple change to the Tentative Order which would have corrected this fatal flaw. That is, the Regional Board could adopt the same review process it had used in the previous MS4 permit to approve the model SUSMP. This suggestion was ignored.

In its response to the Coalition's comment, the Regional Board attempted to generally avoid the Ninth Circuit's holding in *EDC* by stating, "the judicial ruling has not been extended to permits such as the Tentative Order." (Responses to Comments, p. 30.) The Regional Board's response was inadequate for at least three reasons. First, while the Ninth Circuit directly considered the required process for Notices of Intent ("NOIs") under the Phase II

permitting scheme for small MS4s[4], this is a distinction without a difference. The minimum procedural requirements under the CWA must be satisfied whether a permit is a Phase I or Phase II general or individual NPDES permit. Second, these management plans, like the Phase II NOIs, are substantive components of the regulatory regime developed by the regulated party. Third, the Regional Board's description of the role of these management plans in its response to the Coalition's comment was seemingly inconsistent with both the Revised Tentative Order and its response to similar concerns raised public comments submitted on behalf of various environmental groups.

Also on August 30, 2006, the Regional Board issued a Notice of Availability of the Revised Tentative Order. The Notice of Availability invited written comments only on the revisions made in the Revised Tentative Order, and it required that written comments be submitted no later than October 30, 2006. The Notice of Availability also stated that the Revised Tentative Order would be considered for adoption at a meeting of the Regional Board scheduled for December 13, 2006. The Petitioners submitted written comments on the Revised Tentative Order within the specified time period.

On December 4, 2006, the Regional Board surprisingly issued a *second* revised version of the Tentative Order (the "Second Revised Tentative Order") along with a supporting Fact Sheet and Responses to Comments II document, which were all dated December 13, 2006. The Second Revised Tentative Order contained an entirely new and novel regulatory requirement entitled Low Impact Development ("LID") on which the Permittees, Petitioners, and other members of the public had not yet had the opportunity to submit comments. (See Second Revised Tentative Order, Finding D.2.b.-e., section D.1.d.(4).) In the Response to Comments II document, the Regional Board failed to adequately respond to serious issues with the Revised

[4] The Order at issue here is a revised Municipal Storm Water Permit under Phase I.

Tentative Order as raised in comments by interested members of the public, including stakeholders. Then, the Regional Board cancelled its December 13, 2006 meeting stating that it lacked a quorum.

In particular, the Petitioners submitted comments on certain legal deficiencies in the Revised Tentative Order, which included the failure of the Regional Board to provide sufficient factual and expert support for new storm water management standards in excess of what is required by applicable federal laws. (See Responses to Comments II, pp. 20-21.) Rather than point out where such factual and expert support might be found in the Revised Tentative Order, the Regional Board responded that the correlation of the Revised Tentative Order with the preexisting NPDES Permit was by itself sufficient support for its new storm water management standards. (See *id.* at p. 21.) Once again, the Regional Board inadequately responded to the comments submitted by the Petitioners, and other interested members of the public. Without sufficient findings of fact to support its conclusions, the Regional Board's adoption of the Order violates the substantive due process provisions of the Clean Water Act.

The Regional Board issued a Request for Public Comments on the Second Revised Tentative Order dated December 15, 2006. The Request for Public Comments indicated that in order for written comments to be considered and responded to in writing prior to consideration of adoption of the version of the Tentative Order by the Regional Board, "all written comments should be received by the Regional Board no later than 5:00 p.m. on Tuesday, January 2, 2006 [sic]." This deadline failed to meet the mandatory minimum 30-day public comment period by 11 days. (See 40 C.F.R. §§ 124.10(b), 124.11.) Public comment periods are strictly construed. Despite this unlawfully-shortened comment period, the Petitioners submitted written comments by the January 2 deadline.

On January 15, 2007, just nine days prior to the scheduled public hearing on the Order, the Regional Board issued yet a *third* revised version of the Tentative Order (the "Third

Revised Tentative Order") as well as a supporting Fact Sheet and Responses to Comments III document, which were dated January 24, 2007. Among other additions, the Third Revised Tentative Order added a new method for implementation of the LID requirements. (See Third Revised Tentative Order section D.1.d.(7).). The Regional Board did not issue any request for written comments on the Third Revised Tentative Order, but it purported to accept oral comments on all versions of the Tentative Order at its meeting yet to be held on January 24, 2007. The Petitioners testified at the January 24, 2007 Regional Board meeting relating to adoption of the Third Revised Tentative Order.

The Response to Comments III document contained the Regional Board's responses to the comments of interested members of the public on the Second Revised Tentative Order and the shortened public comment period. In this Responses to Comments III document, the Regional Board *yet again* failed to adequately respond to assertions of legal deficiencies in the WDR and NPDES permit reissuance process. For example, the Petitioners and other interested members of the public jointly submitted a comment to the Regional Board pointing out that the Request for Public Comments on the Second Revised Tentative Order did not comply with federal regulations mandating at least a 30-day comment period when adopting NPDES permits. (Response to Comments III, p. 7.) In its response, the Regional Board stated that its Request for Public Comments contemplated submission of written comments up until January 24, 2007, thereby exceeding the required 30 day period. (See *id.* at p. 8.) However, the Request for Public Comments stated unequivocally that "all written comments should be received *no later than* 5:00 p.m. on January 2, 2006 [sic]." (Request for Public Comments, p. 2.) Members of the public could not have known that the Regional Board would accept written comments up until January 24, 2007 based on the language of the Request for Public Comments, because it expressly stated otherwise. Rather, the Regional Board staff kept changing the terms of public participation.

While the Petitioners have continuously participated in the Regional Board's WDR and NPDES permit reissuance process and sought to call attention to certain legal deficiencies and technical infeasibilities in the multiple versions of the Tentative Order, the Regional Board has repeatedly failed to adequately respond. In general, the Regional Board has refused to consider suggested modifications to cure these legal and technical infirmities contained in the multiple Tentative Order versions and now in the Order itself.

Despite these repeated failures to address legal and other deficiencies in the multiple versions of the Tentative Order, the Regional Board adopted the Third Revised Tentative Order in final form as the Order. The Regional Board did so at its meeting on January 24, 2007, just nine days after the Third Revised Tentative Order was issued. In so doing, the Regional Board did not afford an opportunity for interested members of the public to deliberate and present detailed written comments regarding the Third Revised Tentative Order.

III. THE PERMIT UNLAWFULLY ORDERS THE PERMITTEES TO ACCEPT AN IMPROPER DELEGATION OF REGIONAL BOARD AUTHORITY TO REGULATE NON-PERMITTEE PUBLIC AGENCIES

The Regional Board has improperly imposed an obligation on the Permittees to regulate non-permittee local and state agencies with overlapping jurisdictional boundaries, such as school districts, water districts, redevelopment agencies, fire protection districts, hospital districts, and the like. Under California law, the Permittees lack the legal authority to generally enforce and impose their storm water regulations on other local and state agencies. Further, the regulation of those local agencies is a task that is required be carried out directly by the Regional Board itself. The obligation to regulate non-permittee local agencies is improper, and it must be removed from the Order.

The Order requires the Permittees to adopt and apply ordinances to prohibit or otherwise regulate discharges into and from MS4s caused by third parties, without any meaningful legal distinction between private third parties and non-permittee local government

agencies. This distinction is important because cities and the County (i.e., nearly all of the Permitees) are *prohibited* by statute from applying building, zoning, or related land use controls to "the location or construction of facilities for the production, generation, storage, treatment, or transmission of water [or] wastewater ... by a local agency." (Gov. Code § 53091 (d) & (e).) Thus, the prohibition applies to essentially all storm water design and treatment best management practices ("BMPs"). The term "local agency" is broadly defined and includes such public agencies as school districts, redevelopment agencies, joint powers authorities, water districts, and any other agency that locally performs a "government or proprietary function within limited boundaries." (Gov. Code § 53090.) Thus, the Order requires the Permittees to exercise authority over public agencies that is prohibited by statute.

Not only does the Order require the Permittees to improperly exercise prohibited authority over local public agencies, it also places enforcement obligations on the Permittees that must be retained by the Regional Board. For example, the Order requires the Permittees to adopt and apply ordinances to prohibit or otherwise regulate discharges into and from MS4s caused by "non-traditional MS4s." These non-traditional MS4s (many of which are local and state public agencies), such as universities, community colleges, and public schools, have not been designated under the State Board's General Permit for Storm Water Discharges from Small MS4s (the "Small MS4 Permit").[5] (See State Board Order No. 2003-0005-DWQ.) In support of its Small MS4 Permit, the State Board stated that the regional boards may designate non-traditional MS4s at any time subsequent to the adoption of the Small MS4 Permit. (See State Board's Findings In Support of Small MS4 Permit, No. 12.) Instead of designating non-

[5] State Board Water Quality Order No. 2003-0005-DWQ, NPDES Permit No. CAS00000X.

traditional MS4s as intended by the State Board, the Regional Board improperly attempts to transfer its obligation to regulate these Phase II jurisdictions to the Permittees through the Order.

Rather than properly and rationally addressing this legal concern of statewide significance, Regional Board staff flippantly responded by stating that because "the [Permittees] own and operate their own MS4s," they just simply "cannot passively receive discharges from third parties" like non-Permittee public agencies. (Responses to Comments, p. 26.) Even assuming, *arguendo*, that this is a valid interpretation, it fails to address that the Permittees utterly lack the legal authority to adopt and apply ordinances that prohibit or otherwise regulate discharges from the MS4s owned and controlled by non-Permittee local or state agencies. That job is for the Regional Board itself. The Regional Board staff stated, "[t]he MEP standard can be met through the implementation of coordination efforts and agreements with the third parties outside of the [P]ermittees' jurisdictions." (*Id.*) While such efforts and agreements may be theoretically possible, the Regional Board cannot require the Permittees (not to mention other local and state agencies) to take such actions—that is the political province of the governing boards of those legislative bodies.[6] The Permittees' options to enforce against local and state agencies remain extremely limited. The Permittees may find themselves in the untenable position of filing a citizen suit enforcement action the CWA against a sister local agency in order to meet the requirements of the Order. Not only is this bad public policy, but it would also be an inefficient use of judicial and Permittee resources.

Regional Board staff further responded that the Order does not require the Permittees to apply building, zoning, or related land use controls on parties outside of the

---

[6] Significantly, there are dozens of local and state agencies within the region that exercise land use authority and/or operate small MS4s that are not identified in the Order. Efforts by Permittees to "enforce" the Regional Board's Order on these agencies are likely to result in multiple, costly legal disputes that could take many years to resolve. For this reason alone, the State Board should direct the Regional Board to rescind that portion of the Order.

Permittees' jurisdictions. The obvious problem ignored here by the Regional Board is that many local and state agencies share *the same or overlapping* jurisdictional boundaries. The Regional Board's response is confusing as to whether and to what extent the Permittees would be required by the Order to regulate other local agencies, especially in light of the Regional Board's further statement that "where the Government Code provides the [Permittees] with jurisdiction to apply treatment control BMPs to local agency projects, the [Permittees] must mandate treatment control BMPs as required by section D.1.d." (*Id.* at p. 27.) Regional Board staff has cited no authority in support of their interpretation. The prohibition of Government Code section 53091 specifically applies to building and zoning ordinances for the storage, treatment or transmission of water. (See Gov. Code § 53091(d) & (e).) Ordinances requiring treatment control BMPs on local agency projects deal with the "storage, treatment, or transmission of water," and they are within the scope of limitations set forth in Government Code section 53091.

The Petitioners suggested that the issue with respect to such Phase II jurisdictions may be resolved in one of two ways. (See Responses to Comments, p. 26.) The Regional Board could have revised the Order to absolve the Permittees of responsibility for local and state agencies and regulate those parallel public agencies directly by designating them under the Phase II Small MS4 Permit. (*Id.*) Alternatively, the Regional Board could have included those agencies as additional permittees under the Order. (*Id.*) The Regional Board chose to ignore both of these options, thereby creating an infirm obligation to enforce against other agencies which the Permittees have no authority over. This obligation must be removed from the Order.

IV. THE ORDER IMPROPERLY TRANSFERS THE REGIONAL BOARD'S AUTHORITY AND RESPONSIBILITIES CONCERNING PRIVATE THIRD PARTIES TO THE PERMITTEES

Not only does the Order improperly shift Regional Board responsibilities concerning other public agencies to the Permittees, but it also improperly shifts Regional Board responsibilities concerning private third parties to the Permittees. As an example, the Order

requires inspection by the Permittees of industrial and commercial sites to determine if such sites have obtained coverage under the applicable NPDES permit, to assess compliance with other permit requirements, and to perform visual inspections for illicit discharges. (See Order section D.3.b.(3).(a).) These are all activities that are properly handled by the Regional Board and not the Permittees who have no legal authority to undertake enforcement actions for violation of the CWA (other than to file a citizen's suit) or applicable NPDES permits.

These types of provisions requiring enforcement by the Permittees are inappropriate and raise serious issues about Permittee compliance under the Order. Instead of enforcing against the third party dischargers responsible for exceedances of water quality standards, the Regional Board is improperly shifting their enforcement obligations under the Porter-Cologne Act, which delegates enforcement authority to determine violations of the CWA to the Regional Boards, not to the local jurisdictions regulated under the MS4 permit. (Water Code § 13300 et seq.; Water Code § 13399.25 et seq.) This issue is extremely problematic in light of a recent enforcement action against the City of San Diego. These provisions raise serious compliance issues for the Permittees because it is unclear if failure to issue a Notice of Violation to a third party discharger will result in a Permittee violation of the MS4 permit, even though the Permittee has no legal authority to take any enforcement action against the third party discharger for violation of the CWA (other than to file a citizen's suit) or applicable NPDES permits.

V. THE ORDER IMPROPERLY REGULATES DISCHARGES "INTO" THE MS4

The Order also goes beyond the legal authority of the Regional Board by assigning liability for discharges "into" the MS4 to the Permittees. Section 402(p)(3)(B) of the CWA, the basis for municipal storm water regulation, authorizes the issuance of permits for discharges "*from* municipal storm sewers." (33 U.S.C. § 1342(p)(3)(B).) Contrary to this, the Order improperly regulates discharges "into" the MS4 system. It is both inappropriate and

inconsistent with the regulatory scheme for municipal storm water discharges established by the CWA, State Board orders and related court decisions.

Both the courts and the State Board have made clear that the CWA regulates discharges "into" receiving waters – not discharges "into" the MS4. The State Board has previously determined that the Regional Board cannot prohibit discharges "into" the MS4 system and that permit provisions that attempted to regulate all discharges into the MS4 system were too broad in light of the statutory framework of municipal storm water regulation under the CWA. (See State Water Quality Control Board Order No. WQ 2001-15, p. 9.) The State Board stated, "the specific language in this prohibition too broadly restricts all discharges 'into' an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters." (See *id.* at p. 10.) Indeed, a footnote in the State Board's Order provides, "Discharge Prohibition A.1. also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occur in 'waters of the state.'" Therefore, it is interpreted to *apply only to discharges to receiving waters.*" (*Id.* at p. 9 fn. 19 (emphasis added).)

Additionally, in its discussion of the MS4 regulatory scheme the California Court of Appeal in *Building Industry Association of San Diego County v. State Water Resources Control Board* stated, "municipalities and other public entities are required to obtain, and comply with, a regulatory permit limiting the quantity and quality of water runoff that can be *discharged from these storm sewer systems.*" *(Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 871.) Regulating discharges "into" the MS4 system shifts the legal burden of compliance from the discharger to the Permittees without adequate statutory authorization to do so and in violation of the statutory scheme set up for municipal storm water regulation in the CWA.

In the Responses to Comments document, Regional Board staff state, "[s]ince the [Permittees] own and operate their MS4s, they cannot passively receive discharges from third parties." (Responses to Comments, p. 26.) In support of this statement, they cite "F.R. 68766 [sic]" (corresponding to 64 Fed. Reg. 68,766). On this page of the Federal Register, the Environmental Protection Agency ("EPA"), in describing its final Phase II Rule, states, "[t]he operators of regulated small MS4s cannot passively receive and discharge pollutants from third parties." (NPDES—Regulation for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,766.) However, the issue of whether a small MS4 could be required to regulate third parties discharging into their system was not a settled matter. In fact, the EPA went on to explain that the individual permit option is an alternative for municipal system operators who seek to avoid third party regulation according to all or some of the minimum measures required under the general permit. (See *id.*) Thus, the citation to 64 Fed. Reg. 68,766 does not clearly demonstrate federal authority to require MS4 operators to regulate discharges by third parties into their systems.

Further, from a water quality perspective, regulating discharges "into" the MS4 system unduly constrains regional water quality solutions that will benefit water quality, particularly in the context of the watershed management plans in the Order. The internal conflict in the Order between mandating regional solutions, and making those legally difficult, if not impossible, to implement by requiring treatment before discharge into the MS4 system should be eliminated. For all of these reasons, all requirements and implications that the Permittees are responsible for non-compliant and illicit dischargers must be removed from the Order.

VI. THE ORDER UNLAWFULLY USURPS THE LAND USE AUTHORITY OF LOCAL JURISDICTIONS

The authority to determine appropriate land use and planning decisions rests in the local jurisdictions. (See Cal. Const. art XI, § 7.) While the state and regional boards are

vested with the primary responsibility for controlling water quality (see Water Code section 13001), they do not have plenary authority over local land use decisions. Despite this distinction, the Regional Board has mandated certain planning and design decisions. For example, it has mandated LID requirements to be imposed by the Permitees on Priority Development Projects ("PDPs"). Such requirements go beyond the Regional Board's authority to implement and enforce environmental regulations to control water quality, and such requirements unlawfully usurp the land use authority of the local jurisdictions.

Under Section 402(p)(5) and (6) of the CWA, Congress directed the implementation of a comprehensive program to regulate storm water discharges to protect water quality in consultation with state and local officials. (33 U.S.C. § 1342 (p)(5)-(6).) Federal law further specifies that "permits for discharges from municipal storm sewers shall require *controls* to reduce the discharge of pollutants to the maximum extent practicable [("MEP")], including management practices, control techniques and systems, design and engineering methods..." (33 U.S.C. § 1342(p)(3) (emphasis added).) The state and regional boards are vested with the primary responsibility for controlling water quality. (Water Code § 13001; *County of Los Angeles v. State Water Resources Control Bd.* (2006) 50 Cal.Rptr.3d 619, 632.)

At the same time, authority to determine appropriate land use and planning decisions rests with the local jurisdictions. (See Cal. Const. art. XI, § 7.) The California Supreme Court has stated, "Under the police power granted by the Constitution, counties and cities have plenary authority to govern... ." (*Candid Enters., Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) Thus, the local jurisdictions, not the Regional Board, have plenary authority over local land use decisions.

It is important to respect the separate roles that regulatory agencies play in decisions regarding development, specifically with regard to land use decisions and environmental regulation. A Supreme Court case involving the California Coastal Commission

notes these important distinctions between land use planning and environmental regulation by stating: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities." (*Cal. Coastal Com v. Granite Rock Co.* (1987) 480 U.S. 572, 582.) Further, "[t]he CWA is not a land-use code; it is a paradigm of environmental regulation." (*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (2001) 531 U.S. 159, 192 (dissent by Justice Stevens).)

The Porter-Cologne Act respects the separate authority of state and regional boards, on the one hand, and local jurisdictions, on the other. For example, California Water Code section 13360(a) expressly precludes regional boards' orders and waste discharge requirements from specifying the particular design, location, type of construction, or particular manner in which compliance with water quality standards must be achieved. (Water Code § 13660(a).) In short, a regional board has the charge of enforcing the CWA and the Porter-Cologne Act, but it does not have any authority to make land use decisions. When a regional board mandates specific and certain planning and design activities to local jurisdictions, that board is unlawfully usurping the authority of the local jurisdictions whose job it is to make decisions with respect to land use planning and development.

In considering the MS4 permit previously adopted by the San Diego Regional Board, the State Board recognized the importance of respecting the very different roles of local agencies and regional boards in the issuance of MS4 permits. In reviewing that MS4 Permit, the State Board found that the BMPs specified as controls to reduce the discharge of pollutant to the MEP consisted of "programmatic and planning requirements for the permitees...similar to those in other MS4 Permits" and designed to control pollutants in storm water. (State Water Resources

Control Board Water Quality Order No. 2001-15, p. 2). The State Board concluded that it was appropriate to include *programmatic* requirements in MS4 permits to control pollutants to the MEP, including numeric design criteria for certain treatment control BMPs. (*Id.* at p. 3.).

This Order goes too far in mandating certain development LID planning requirements, and therefore unlawfully exercises land use authority in violation of the separation of powers doctrine and contrary to Water Code section 13360. Instead of programmatically identifying a menu of BMPs, technologies and controls that local jurisdictions could consider and choose to implement in the context of their planning and land use decisions, and specifying the performance standards for these controls, the Order goes far beyond the programmatic specification of available storm water quality controls and technologies. Instead of identifying a menu of land use-related BMPs, and design standards for those BMPs which are necessary to protect water quality, the Order mandates specific and certain planning and design decisions, and thereby impinges upon the exercise of discretion by the local agencies with planning and land use jurisdiction. For example, Permittees are mandated to require high priority developments to conform to specific drainage designs for roof, driveways, and sidewalks, conserve existing trees, construct streets and sidewalks to minimum widths, minimize the impervious footprint of the project, and minimize soil compaction, unless the project proponent can demonstrate that such mandates are infeasible. Importantly, no regulatory guidance exists with respect to the requirements for demonstrating infeasibility. As a result, the Regional Board's approach to site design BMPs, including the LID requirements set forth in the Order, comprise an unlawful usurpation of the Constitutionally-derived land use authority of local jurisdictions.

VII. ADOPTION OF INTERIM HYDROMODIFICATION CRITERIA IS INFEASIBLE AND INAPPROPRIATE

The Order requires the Permittees to develop Interim Hydromodification Criteria prior to the development of the final Hydromodification Management Plan ("HMP") standard.

The Interim Hydromodification Criteria do not differ substantively from the final HMP standard. Thus, the Permittees are required to develop criteria in 365 days that the Regional Board itself has acknowledged will require additional study, analysis, resources, and time to develop (at least three years by the Board's own estimation).

Regional Board staff acknowledged that it will take approximately two-and-a-half years at the very least to develop an adequate HMP for the region. (See Order section J.2.a.(2).) However, within 365 days of the adoption of the Order, the Permittees must identify and implement Interim Hydromodification Criteria and require Priority Development Projects ("PDPs") disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flows and durations as required by the Interim Hydromodification Criteria. (See *id.* at section D.1.g.(6).) The 365 day time-frame is not feasible because the same technical analysis required to develop a regional plan will also be required to develop the Interim Hydromodification Criteria for PDPs.

The development and implementation of Interim Hydromodification Criteria for PDPs disturbing 50 acres or more is not appropriate. The State Board's Blue Ribbon Panel, convened by the State Board to assist in the evaluation of State policy concerning advanced treatment, hydromodification, and numeric effluent limits, has recommended that an effective storm water strategy include control of energy discharges for channel forming events completed under a watershed management plan and not site-by-site. (See Blue Ribbon Panel Recommendations, p. 14.) The Interim Hydromodification Criteria would apply this type of control on a site-by-site basis, rather than under a watershed management plan. Further, a jurisdiction-by-jurisdiction approach to development of hydromodification criteria will likely lead to confusion as different criteria are applied throughout the region. Given the infeasibility of developing Interim Hydromodification Criteria for PDPs in 365 days and the Blue Ribbon Panel's recommendation that this type of control be completed under a watershed management

plan, the Regional Board should have put PDPs disturbing 50 acres or more on the same schedule as other entities that will be covered by the regional HMP. Even assuming that an interim HMP could be technically developed in 365 days, the Order does not provide sufficient time for the Regional Board to provide the required due process protections described in this Petition.

VIII. THE ORDER CREATES THE POTENTIAL FOR CONFLICT BETWEEN STATE BOARD AND REGIONAL BOARD POLICIES

As previously discussed, the State Board has convened a "Blue Ribbon Panel" to assist it in evaluating appropriate State policy concerning advanced treatment, hydromodification and numeric effluent limits. (See Blue Ribbon Panel Recommendations). The Blue Ribbon Panel has published its evaluation, including its concerns, on these topics in a report to the State Board. Instead of allowing the State Board to review the Blue Ribbon Panel's recommendations and develop a state-wide policy or approach in these areas, the Regional Board has seemingly disregarded the Blue Ribbon Panel's recommendations by incorporating its own WQBELs, hydromodification, and advanced treatment requirements in the Order. In so doing, the Regional Board has run the risk that the renewed Order will be inconsistent with the requirements of the General Construction Storm Water Permit and the General Industrial Storm Water Permit when they are re-issued by the State Board. Inconsistencies between these permits will impose an unnecessary economic and administrative burden on the Permittees, businesses and the public at large.

Under the Order, the Permittees must require the implementation of advanced treatment at construction sites, and they must develop and implement an HMP. The Permittees must require implementation of advanced treatment at construction sites that are determined by the Permittees to be an "exceptional threat to water quality." (Order section D.2.c.(2).). Each Permittee is to consider eight identified factors in evaluating the threat to water quality. The

Permittees must also collaborate with other Permittees to develop and implement a HMP. That plan must, among other things, require PDPs to, under certain circumstances, implement certain hydrologic control measures.[7]

Hydromodification policy should be developed in a coordinated manner across the state.[8] Indeed, the State Board is considering the degree to which hydromodification needs to be regulated to protect water quality and has already acted to undertake regulation of hydromodification. (See, e.g., State Water Resources Control Board Order No. 2004-0004-DWQ.) To inform its policy decisions about hydromodification policy, the State Board convened the Blue Ribbon Panel to evaluate, *inter alia*, advanced treatment, HMPs and Numeric Effluent Limits in its recommendations to the State Board.

The Blue Ribbon Panel observed that active treatment technologies involving the use of polymers with large storage systems now exist that can provide much more consistent and very low discharge turbidity. (Blue Panel Recommendations, p. 15.) It also observed that "toxicity has been observed at some locations" and "[t]here is always the potential for an accidental large release of such chemicals with their use." (*Id.*) The Blue Ribbon Panel stated,

---

[7] Order section D.1.g.(1)(c) provides that the HMP shall:

> Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

[8] The importance of a state-wide approach to regulating hydromodification is underscored in a letter from (former) CalEPA Secretary Tamminen to the State Board in which Secretary Tamminen calls for the State Board to "adopt a detailed program to be used by the regional boards to provide consistent protection for the remaining state waters no longer subject to federal jurisdiction." (Letter from T. Tamminen, California EPA Secretary, to A. Baggett, Chair, State Water Resources Control Board, August 27, 2004, p. 1.)

"[i]n considering widespread use of active treatment systems, full consideration must be given to whether issues related to toxicity or other environmental effects of the use of chemicals has been fully answered." Further, "[c]onsideration should be given to longer-term effects of chemical use, including operational and equipment failures or other accidental excess releases." (*Id.* at p. 17.)

The Blue Ribbon Panel also considered runoff volume and peak flow in its findings on the feasibility of numeric effluent limits applicable to municipal activities. The Blue Ribbon Panel looked at data charting exceedance frequencies for detention basins in Fort Collins, Colorado, and it noted that "[t]the peak flow frequency curve can be adjusted back to its predevelopment character by the proper application of runoff controls." (Blue Ribbon Panel Recommendations, p. 12.) It went on to state, "[b]ut while these controls restore the peak flow frequency to its natural regime, the duration of flows at the low end (but still channel "working") of the flow frequency curve is greatly increased, which raises potential for channel scour in stream channels with erosive soils." (*Id.*) In short, the Blue Ribbon Panel's observations identify significant concerns associated with hydromodification.

As a matter of prudent public policy, the State Board should have the opportunity to review the Blue Ribbon Panel's recommendations and develop a state-wide policy or approach prior to the inclusion of advanced treatment and HMP in the Order. By including advanced treatment and HMP in the Order, the Regional Board may be acting inconsistent or in conflict with a state-wide approach or policy.

With respect to numeric effluent limits, the subject of the Blue Ribbon Panel's recommendations, the Blue Ribbon Panel concluded that incorporation of such limits in municipal storm water permits was not feasible. (See Blue Ribbon Panel Recommendations, p. 8.) However, the Regional Board has seemingly disregarded the Blue Ribbon Panel's recommendations in its incorporation of WQBELs into the Order. The State Board, which

convened the Blue Ribbon Panel, should have the opportunity to review the Blue Ribbon Panel Recommendations and determine how those recommendations should be developed into a state-wide policy prior to incorporation of numeric effluent limits into MS4 permits.

Additionally, especially in light of the Blue Ribbon Panel's recommendations, the Order may be inconsistent with the requirements of the General Construction Storm Water Permit when it is reissued by the State Board. Inconsistencies between these two permits would impose an economic and administrative burden on both the Permittees and Petitioners. It is important for the statewide General Construction Storm Water Permit and the statewide General Industrial Storm Water Permit to govern discharges from those types of facilities to the standards applicable in those permits (BAT/BCT) without unnecessary and confusing interference by the Regional Board through the adoption of this Order. It should also be noted that the General Construction Storm Water Permit (State Water Resources Control Board Order No. 99-08-DWQ) and the General Industrial Storm Water Permit (State Water Resources Control Board Order No. 97-03-DWQ) provide sufficient regulation to protect water quality and have stricter standards for protection of water quality. As a result, the proposed regulation of construction and industrial sites under the Order creates unnecessary, duplicative regulation and requires additional water quality control in accordance with a different water quality standard (MEP v. BAT/BCT), which will be confusing to the regulated community without providing any real water quality benefit.

IX. THE REGIONAL BOARD FAILED TO CONSIDER THE FACTORS IDENTIFIED IN WATER CODE SECTION 13241

Many requirements in the Order exceed the federal MEP standard required by the CWA. These requirements include, among others, the control of runoff from all construction and industrial sites, additional inspection and MS4 cleaning requirements, and advanced treatment. In addition, to the extent that the Order contains mandates with respect to site design

BMPs, LID requirements, and volume control and infiltration that are infeasible to meet currently, and thereby are technology forcing, those provisions also exceed the federal MEP storm water quality control standard. The California Supreme Court has concluded that a regional board must take into account the factors listed in Water Code section 13241 and relevant case law when adopting standards that are more stringent than federally imposed standards. (See *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 627.)

The Order contains many provisions that exceed the requirements of federal law. Further, because Petitioners' prior comment letters, and the previously submitted matrix comparing federal law requirements with provisions of the Order, all constitute specific evidence in the record with respect to the manner in which federal law requirements are exceeded, case law mandates that all the requirements must be considered and balanced under Water Code section 13241. (*City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1386-1386.) The Regional Board has taken the position that this analysis is not required because the Order does not exceed federal law. This position is mistaken.

Water Code section 13241 requires that the Regional Board consider a number of factors in its adoption of water quality standards, including economic impacts, environmental characteristics of the region, the need for housing within the region, and the need to develop and use recycled water. (See Water Code § 13241). Analysis of these factors was required prior to adoption of the Order. It was not, and has yet to be done.

Finally, Section 13263 combines with Section 13241 (especially subsections (b), (d) and (e)) to indicate the need for a reasonable degree of resolution when imposing "requirements as to the nature of any proposed discharge...." (Water Code §§ 13241(b), (d)-(e), 13263.) For example, Section 13241(b) requires balance of the "[e]nvironmental characteristics of *the hydrographic unit under consideration*...." (*Id.* § 13241(a) (emphasis added).) The Order

fails to strike balances with an appropriate degree of resolution. Instead, the Order imposes sweeping, across-the-board, one-size-fits-all mandates for the entire region. This deficiency serves to underscore the fact that, concerning questions of land use, appropriate balances are best left ultimately to the local permitting authority, as the Legislature intended.

X. THE ORDER UNLAWFULLY REQUIRES THE PERMITTEES TO DESIGN THEIR OWN MANAGEMENT PLANS WITHOUT PROPER PUBLIC PARTICIPATION AND REVIEW BY THE REGIONAL BOARD

The Order requires the Permittees to develop Jurisdictional Urban Runoff Management Plans ("JURMPs"), Watershed Urban Runoff Management Plans ("WURMPs"), and a Regional Urban Runoff Management Plan ("RURMP") (collectively referred to as "Management Plans"). It also requires the Permittees to develop Interim Hydromodification Criteria and an updated Model SUSMP. The law requires that all of these documents be subject to public participation and review by the Regional Board. Nevertheless, the Order fails to provide for these important procedures.

A. The Management Plans Must Be Subject To Public Participation and Review by the Regional Board.

The Permittees have been given significant flexibility in developing, revising and updating the Management Plans required by the Order. This is analogous to the regulatory scheme under the Phase II Rule which was considered by the court in *EDC*. (See *EDC*, *supra*, 344 F.3d at pp. 855-856.) Under the Phase II Rule, when a discharger opted to file a notice of intent ("NOI") to comply with a general permit, the Storm Water Management Plan ("SWMP") supporting the NOI had to contain information on an individualized pollution control program that addressed six general criteria. (See *id.* at p. 853.) There, as here, the regulated parties were required to design aspects of their own storm water management programs. (See *id.* at p. 856.)

For this reason, the agency review and public participation requirements applied to the Phase II SWMPs by the court in *EDC* must also be applied to the Management Plans required by the Order. The Order fails to provide the procedure to fulfill these requirements. Thus, the Regional Board has failed to perform a nondiscretionary duty.

Regional Board staff attempted to distinguish the *EDC* case in the Responses to Comments document by the bald assertion that "[t]he Tentative Order is not a general Phase II NPDES permit, it is an individual Phase I NPDES permit." (Responses to Comments, p. 29.) However, the Order is functionally similar to a general permit. (40 C.F.R. § 122.28.) Further, similar to a SWMP, the Regional Board must review the details of the Management Plans to ensure that the applicable standards are met.

Regional Board staff further stated that the judicial ruling has not been extended to permits such as the Tentative Order. (See Responses to Comments, p. 29.) This is a distinction without a difference. The agency review and public participation requirements mandated by the CWA apply to the Order regardless of whether it is Phase I or Phase II NPDES Permit. No authority has been cited for treating Phase I and Phase II, individual or general NPDES permits differently in this regard.[9]

Regional Board staff further stated that any new requirements in the Order are "essentially extensions or enhancements of already existing requirements." (*Id.* at p. 33.) Even assuming, *arguendo*, that this were true with regard to JURMPs and WURMPs, the mandatory CWA requirements for agency review and public participation apply because the revised and updated JURMPs and WURMPs are substantive components of the Order. A provision in this

[9] Assuming, *arguendo*, that the *EDC* holding applies only to Phase II permits, Regional Board staff has conceded the Order is a Phase II permit by attempting to support the Revised Tentative Order's requirements by citing Code of Federal Regulations Phase II regulations and Environmental Protection Agency Phase II guidance.

Order is not "shielded" from agency review and public participation requirements simply because it is included in the previous MS4 permit, and Regional Board staff cite no authority to the contrary. Further, there is no RURMP requirement under Order No. 2001-01.

The Petitioners, in their comment letter concerning the Revised Tentative Order, identified inconsistencies in the Regional Board's responses regarding the role of the urban runoff management plans. (See Responses to Comments II, p. 13.) The Regional Board's response that "the plans only serve as descriptions of the programs, to be used by the [Permittees] to guide their implementation," was inconsistent with the Revised Tentative Order itself. The plans are intended to provide a detailed, written account of the overall programs, and they must be submitted to the Regional Board for review. Further, modifications of the programs may be initiated by the Executive Officer of the Regional Board, or the Permittees may submit requests for the modification to the Executive Officer. The requirements of the Order, as they were finally adopted, demonstrate the plans inform the Regional Board regarding the details of each of the programs, and they are essential to the Regional Board's ability to monitor and enforce those programs. The Regional Board's characterization calls into question its ability to enforce the contents of these plans.

B. Interim Hydromodification Criteria Must Be Subject to Public Participation and Regional Board Review

The Order also requires the Permittees to collectively identify an interim range of runoff flow rates for which Priority Development Project ("PDP") post-project runoff flow rates and durations shall not exceed pre-project flow rates and durations ("Interim Hydromodification Criteria"), "where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations." (Order section D.1.g.(6).) Starting 365 days after adoption of the Order and until the final HMP standard and criteria are implemented, each Permittee must

require PDPs disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. (See *id.*)

The Order does not require that the Interim Hydromodification Criteria be reviewed by the Regional Board, and it does not provide for public availability and a public hearing. The Permittees are required to design this substantive component of the Order, and under the Ninth Circuit's holding in *EDC*, the mandatory agency review and public participation requirements under the Clean Water Act must be satisfied. (See *EDC, supra*, 344 F.3d at p. 856.) Thus, assuming it is appropriate to include Interim Hydromodification Criteria (which Petitioners do not believe to be the case), the Order must be further revised to provide for agency review and public participation regarding the Interim Hydromodification Criteria.

C. The Updated Model SUSMP Must Be Subject to Public Participation and Regional Board Review

The Order requires that the Permittees develop an updated Model SUSMP and submit it within 18 months of adoption of the Order. While the Order contemplates Regional Board "acceptance" of the model SUSMP, the Permittees must implement its provisions if they have not received certain correspondence from the Regional Board within 60 days of submittal. The provisions of the Order with respect to the Model SUSMP fail to provide for the necessary public participation and Regional Board review.

XI. THE REGIONAL BOARD FAILED TO COMPLY WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT ("CEQA")

The Regional Board incorrectly determined that the Order is exempt from CEQA. The Order includes Total Maximum Daily Load ("TMDL") Water Quality Based Effluent Limits ("WQBELs") for diazinon in Chollas Creek and Shelter Island Yatch Basin WQBELs. (See Order section H.) These provisions are properly adopted in water quality control plans (known

as "Basin Plans"), and they are subject to evaluation and review under both CEQA and Water Code section 13241. (See *City of Arcadia, et al. v. State Water Resources Control Board, et al.* (2006) 135 Cal.App.4th 1392, 1422-1423 (addressing application of CEQA to the basin planning process).)

By including these provisions in the Order, the Regional Board has avoided the required CEQA review procedures. Adoption of TMDL waste load allocations as numeric WQBELs requires an evaluation of various factors including beneficial uses, economic considerations, and the need for developing housing within the region. (See Water Code § 13241.) Also, it requires CEQA review. (See *City of Arcadia, et al. v. State Water Resources Control Board, et al.* (2006) 135 Cal.App.4th 1392, 1422-1423 (the basin planning process of the State Board and the Regional Boards is a certified regulatory program).)

The Order poses significant environmental impacts. For example, the implementation of pollution controls to comply with the Order can require, among other things, significant urban planning, development and redevelopment projects for storm water management, and construction of treatment systems for storm water runoff. These are the types of projects that typically are subject to CEQA review.

The failure to conduct CEQA review for at least those portions of a NPDES permit which would be subject to such review if adopted pursuant to the statutory procedure established by the Water Code benefits few parties, if any. The CEQA review process serves to inform not only the public agency that is making the decision, but also the public in general.

Further, the Regional Board relies on the Coastal Zone Reauthorization Act of 1990 for authority to impose hydromodification requirements. In Responses to Comments II, the Regional Board admits that its exemption under CEQA is limited to implementation of NPDES permits, which arise out of the CWA. The Regional Board cannot rely on CWA exemption to CEQA for requirements arising out of CZARA.

XII. THE REGIONAL BOARD FAILED TO PROVIDE THE REQUIRED PUBLIC NOTICE AND OPPORTUNITY TO COMMENT PRIOR TO ADOPTING THE ORDER

Public notice and the opportunity for members of the public to comment play an important role in informing the decision of a permitting authority whether to adopt or renew a NPDES permit, and such procedures are required by the CWA. (See 33 U.S.C. § 1342(a)(1), (b)(3).) Federal regulations applicable to state programs require that public notice of the preparation of a draft NPDES permit allow at least 30 days for public comment. (See 40 C.F.R. § 124.10(b).) During the 30-day public comment period, any interested person may submit written comments on the draft permit. (See 40 C.F.R. § 124.11.) These requirements apply here because the Order renews NPDES Permit No. CAS0108758. Nonetheless, the Regional Board failed to satisfy the mandatory public participation requirements on at least two occasions leading up to the adoption of the Order.

One of the occasions occurred in connection with Second Revised Tentative Order dated December 13, 2006. The Executive Officer of the Regional Board issued a "Request for Public Comments," dated December 15, 2006, which solicited comments on specific sections of the Second Revised Tentative Order. Among the specific sections of the Revised Tentative Order were new revisions which added Low Impact Development ("LID") site design BMP requirements, and defined the term "LID." These new requirements were not a logical outgrowth of the prior version of the Tentative Order, and interested parties could not have reasonably anticipated these revisions. (See *National Resources Defense Council ("NRDC") v. U.S. E.P.A.* (9th Cir. 2002) 279 F.3d 1180, 1186 (citing *NRDC v. EPA* (9th Cir. 1988) 863 F.2d 1420, 1429 and 40 C.F.R. § 124.10.) Thus, this was the first time the Petitioners were given an opportunity to comment on the new provisions, and they were entitled to the mandatory 30-day comment period.

Nonetheless, the Regional Board prematurely cut-off the public's opportunity to provide written comments in violation of federal law. The Request for Public Comments provided in pertinent part, "In order for written comments to be considered and responded to in writing prior to consideration of adoption of the Tentative Order by the Regional Board, **all written comments should be received by the Regional Board no later than 5:00 PM on Tuesday, January 2, 2006 [sic]**" (Request for Public Comments, p.2 (emphasis in original).) The Request for Public Comments was issued on the date that it was signed, December 15, 2006. The public was only given approximately 19 days to submit written comments on these significant revisions. Even if the Regional Board intended to consider written comments submitted after January 2, 2007, this would not have been clear to members of the public based on the bold-face language of the Request for Public Comments. While the opportunity to submit oral comments was provided during the public hearing on January 24, 2007, the detail provided in written comments is difficult, if not impossible, to convey under the time pressures of a public hearing (i.e. two or three minutes to speak.)

The Regional Board violated the public participation requirements a second time when it issued the Third Revised Tentative Order on January 15, 2007, just nine days prior to the public hearing on January 24, 2007. The Third Revised Tentative Order, like the Second Revised Tentative Order, made substantive revisions that went beyond any logical outgrowth of the prior version of the Tentative Order and which interested members of the public could not have reasonably anticipated. Therefore, the Regional Board was required to afford members of the public the full 30-day notice and opportunity to comment.

As an example of such revisions, the Third Revised Tentative Order greatly expanded the number of projects that would fall under the requirements for Priority Development Projects ("PDPs") in an unanticipated way. Order section D.1.d(1)(b) was revised to state, in pertinent part, "within three years of adoption of this Order Priority Development

Projects shall also include all *other pollutant generating* Development Projects that are equal to one acre in size or greater" (Third Revised Tentative Order section D.1.d.(1)(b) (revised language in italics).) A footnote was added following the quoted language which provides, "[p]ollutant generating Development Projects are those projects that generate pollutants at levels greater than background levels." (*Id.*) Even if it could have been reasonably anticipated (which it could not have been) that "other pollutant generating Development Projects" may have been included, it would not have been reasonably anticipated that this would be defined in terms of whether a project generates pollutants at levels greater than background levels rather than in terms of causing or contributing to the exceedance of a water quality objective.

As a second example, new provisions were added requiring the update of SUSMPs to incorporate LID and other BMP requirements. New provisions regarding LID had only recently been added to the Second Revised Order dated December 13, 2006. In the Third Revised Tentative Order, issued just nine days before the January 24, 2007 public hearing, the Regional Board added substantial detail to the way LID and other BMP requirements would be applied by the Permittees to PDPs within their jurisdictions. (See Third Revised Tentative Order section D.1.d.(7).) These additions went beyond a logical outgrowth of the previous version of the Tentative Order, and interested members of the public could not have reasonably anticipated this improper extension of Regional Board authority over traditional land use decisions reserved to the local jurisdictions.

The Regional Board's failure to satisfy the mandatory public participation requirements is a violation of federal law. Public participation is a vital part of the process that informs the decision of a permitting authority. Here, that vital part of the process was cut short. Petitioners respectfully request that the State Board direct the Regional Board to comply with these requirements.

XIII. THE ORDER IS REPLETE WITH UNFUNDED MANDATES

The Order mandates that the Permittees provide new programs and higher levels of service without any reimbursement for those new programs and higher levels of service. The California Constitution provides that the state government may not mandate a new program on, or require higher level of service from a local government without reimbursing that local government for the costs of that program. (See Cal. Const., art. XIII B, § 6(a).) The Order is replete with new programs and higher levels of service, yet it fails to provide for any reimbursement to the Permittees.

A. The Order Contains New Programs and Higher Levels of Service Without Any Reimbursement

In order for a state mandate to constitute a "new program" or "higher level of service" within the meaning of Article XIII B, Section 6, it must be either a program that carries out the governmental function of providing services to the public, or it must be a law that imposes a requirement that is unique to local government. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.) The provisions of the Order do just that. The Order imposes requirements on the MS4s operated by the Permittees — County of San Diego, the incorporated cities of San Diego County, the San Diego Unified Port District and the San Diego County Regional Airport Authority. The operation of these MS4s carry out the Permittees' governmental function of providing services to the public, and the Order imposes requirements unique to local government such as inspecting residential post-construction BMPs and industrial and commercial facilities.

The Order contains many examples of new programs and requirements for higher levels of service. For example, the Order imposes new inspection requirements regarding residential post-construction BMPs. It also mandates inspections of new classes of industrial and commercial facilities, and it imposes increased requirements regarding MS4 cleaning. Additionally, it requires the creation of a RURMP, an HMP, and the development and

implementation of Watershed Water Quality Activities and Watershed Education Activities, none of which are mandated by the CWA. These are just a few of the new programs or higher levels of service required by the Order.

Unless the new program or higher level of service is required pursuant to a federal mandate, the local government is entitled to reimbursement. (See *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, 867.) The California Supreme Court explained that the purpose of Article XIII B, Section 6 is "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill-equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735 (quoting *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81).)

B. The New Programs and Higher Levels of Service Go Beyond the Federal Maximum Extent Practicable Standard

While these new programs and higher levels of service may be authorized by federal law, they are not *required* by federal law.[10] Thus, there is no federal mandate. These new programs and higher levels of service go beyond the federal maximum extent practicable MEP standard established by Section 402(p) of the CWA. Section 402(p) of the CWA requires that permits for discharges from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable...." (33 U.S.C. § 1342(p)(3)(B)(iii).) The

[10] The Findings in the Order provide, "[r]equirements in this Order that are more explicit than the federal storm water regulations in 40 CFR 122.26 are prescribed in accordance with the CWA section 402(p)(3)(B)(iii) and are necessary to meet the MEP standard." (Order, Finding E.9.) This general, conclusory statement is insufficient to show that the new programs and higher levels of service in the Order are in fact necessary to fulfill mandatory requirements under the federal regulations or to comply with the federal MEP standard.

Regional Board may impose standards stricter than the federal MEP standard. (See *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880-891; see also *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166-1167.) However, new programs and higher levels of service adopted pursuant to the Regional Board's discretionary authority to impose standards stricter than the MEP are not required pursuant to a federal mandate. Thus, Regional Board staff's citation to federal authority that may allow, but does not require, a certain provision of the Order does not demonstrate a federal mandate.[11] (See *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 627-628.)

C. Regional Board Staff Failed To Adequately Demonstrate That Many of the New Programs or Higher Levels of Service Are Required By Federal Law

Regional Board staff has cited federal statutes and sections of the Code of Federal Regulations in an attempt to demonstrate the specific legal authority for many provisions of the Order. While the cited federal authority may authorize the provisions, in many instances the new programs or higher levels of service are not *required* by the language of that authority. Regional Board staff was asked to identify the legal authority relied on for various programs, especially in light of the unfunded mandates issue. In order to inform the analysis of the unfunded mandates issue, Regional Board staff must do more than merely cite or parrot federal regulations that give

---

[11] An example of mandatory language is found at Section 402(q) of the CWA, 33 U.S.C. section 1342(q). This subsection provides:

> Each permit, order, or decree issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy.")

The inclusion of requirements necessary to conform to the CSO control policy in a NPDES permit for a municipal combined storm and sanitary sewer would be done pursuant to a federal mandate.

the Regional Board authority (rather than a duty) to impose new programs or higher levels of service. Where the new programs and higher levels of service are not specifically *required* by the federal regulations, Regional Board staff must show that they are necessary to meet the MEP standard. Neither the Order nor the multiple Responses to Comments documents provide this explanation.

As an example, the Order requires the Permittees to develop and implement an HMP. (See Order section D.1.g.) Regional Board staff stated in response to comments from the Permittees that limits have been placed on urban runoff flows under certain circumstances to protect the beneficial uses of waters as required by federal law. (See Responses to Comments, pp. 60-61.) As an initial matter, Regional Board staff identified no studies or factual data supporting their claim that any specific water bodies' beneficial uses have been impaired as a result of hydromodification impacts. Moreover, no federal authority requires the development and implementation of an HMP to protect beneficial uses. Further, it has not been shown that the development and implementation of an HMP, and particularly a ban on hardened improvements, is the only strategy available to the Regional Board in order to satisfy its obligation to protect the beneficial uses of the waters at issue here. Thus, there is no federal mandate that the Regional Board require the development and implementation of an HMP in the Order. The HMP requirements apply to, among others, capital improvement and maintenance projects of the permittees. Therefore, costs associated with the development and implementation of the HMP requirements, including those associated with flood control capital improvement and maintenance projects, are incurred pursuant to an unfunded state mandate.

As a second example, the Order requires each Permittee to implement a schedule of maintenance activities for the MS4, and MS4 facilities which must include inspection at least once a year between May 1st and September 30th of each year for all MS4 facilities that receive or collect high volumes of trash and debris, and at least annual inspection of all other MS4

facilities. (See Order section D.3.c.(3)(b).) Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed but not less than every other year. (*Id.*) This constitutes a higher level of service compared to the existing MS4 permit. (See Order No. 2001-01 section F.3.a.(5).) As specific legal authority for the annual inspection and cleaning of MS4s, Regional Board staff relies on 40 Code of Federal Regulations section 122.26(d)(2)(iv)(A)(1, 3 and 4). (See Responses to Comments, p. 62.) The cited subdivisions of this section do not require the annual inspection and cleaning of MS4s. Assuming, *arguendo,* that the Regional Board is authorized by this section to impose annual inspection and cleaning of MS4s, it is not *required* to do so. Further, it has not been shown that annual inspection and cleaning of MS4s is necessary to meet the federal MEP standard. Therefore, this higher level of service in the Order is not required pursuant to a federal mandate. Instead, it is an unfunded state mandate.

As a third example, the Order places additional requirements on the Permittees with regard to the descriptions and analysis of Watershed Activities, and it requires no less than two Watershed Water Quality Activities and two Watershed Education Activities be in an active implementation phase in each permit year. (See Order section E.2.f.(4).) The new requirements regarding the WURMPs constitute a higher level of service compared to the existing permit. Regional Board staff cite 40 Code of Federal Regulations section 122.26(a)(3)(ii), 40 Code of Federal Regulations section 122.26(a)(3)(v), 40 Code of Federal Regulations section 122.26(a)(5) and 40 Code of Federal Regulations section 122.26(d)(2)(iv) as specific legal authority for this requirement. (See Responses to Comments, pp. 63-64.) While these regulations may provide such authority, it does not mandate the imposition of a watershed program, nor does it require the new levels of service in the Order. Thus, the new levels of service required with regard to the WURMPs constitute unfunded state mandates.

These are just three examples of new programs or higher levels of service imposed by the Order and subject to reimbursement as unfunded state mandates. It is essential to identify in the Order what is required of Permittees that is above and beyond that mandated by federal law instead of what is merely permitted by federal law. Because the Regional Board staff refused to provide a clear identification of the requirements that exceed federal mandates, it was impossible for the Regional Board to identify the extent to which it is requiring Permittees to develop new programs or higher levels of service under Porter-Cologne, rather than the CWA, thereby running afoul of the prohibition on unfunded state mandates as demonstrated by the detailed analysis provided by the Permittees in their comment letter dated June 7, 2006.

D. The Permittees Are Entitled To Challenge The Unfunded State Mandates Through A "Test Claim."

It is apparent that the Permittees are ill-equipped to assume the enormous cost of providing the higher level of service mandated by the Order. The Permittees identified some of the problems that local governments will face in their attempts to raise funding for this purpose. (See Permittee Letter dated June 7, 2006.) During the public hearing on June 21, 2006, the Permittees testified not only with regard to the estimated cost of the higher levels of service, but also regarding their need to satisfy other mandates, such as providing adequate emergency services and roads, with limited funds.

The Permittees may challenge the unfunded state mandates in the Order by filing a "test claim" with the Commission on State Mandates. (See *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 332.) The Commission will hear and decide whether there are in fact costs mandated by the state. (See Gov. Code § 17551.) Once the Commission has determined that there are in fact costs mandated by the state, the Legislature must, for any amount owed to local governments determined in the previous year, either pay the balance or suspend the operation of the mandate for the following fiscal year. (See Cal. Const. art. XIII B, § 6(b)(1).)

Regional Board staff's reliance on federal statutes and regulations for the authority to adopt many of the new programs and higher levels of service in the Order does not demonstrate that those new programs and higher levels of service are required by a federal mandate. Thus, when challenged, it seems likely that the Commission will determine the costs for these new programs and higher levels of service are mandated by the state, and thus the Permittees will be entitled to reimbursement.

The State Board should remand the Order the remove the unfunded mandates both for reasons of judicial economy and public policy.

XIV. CONCLUSION

For the foregoing reasons, the State Board should rescind the Order and remand it back to the Regional Board for revision and rehearing subject to the due process requirements of the CWA. The Petitioners request that the State Board hold this Petition in abeyance, pursuant to 23 CCR section 2050.5(d). Submitted concurrently is a Request for Stay of the Order until a decision has been made on this Petition. The Petitioners intend to submit a supplemental Petition and Points and Authorities after reviewing the transcript and administrative record of proceedings. Upon submission of the supplemental Petition and Points and Authorities, the Petitioners intend to request that the Petition be removed from abeyance and that the Petition be activated.

DATE: FEBRUARY 22, 2007

FOLEY & LARDNER
S. WAYNE ROSENBAUM
JOHN C. LEMMO
ALYSSA AIKO OSUGI

By: _____
JOHN C. LEMMO
ATTORNEYS FOR PETITIONER